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No. 80-349

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL CHAMBER ALLIANCE FOR POLITICS, ET AL., PETITIONERS,

v.

FEDERAL ELECTION COMMISSION, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

CHARLES N. STEELE
General Counsel

KATHLEEN IMIG PERKINS
Assistant General Counsel

SONDRA L. MILLS
Attorney

Attorneys for

FEDERAL ELECTION COMMISSION,
MAX L. FRIEDERSDORF
JOHN W. MCGARRY
JOAN D. AIKENS
THOMAS E. HARRIS
FRANK P. REICHE
ROBERT O. TIERNAN
EDMUND L. HENSHAW, JR.,
J. STANLEY KIMMITT

1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

OCTOBER 6, 1980

QUESTIONS PRESENTED

(1) Whether the courts below properly concluded that petitioners' challenge to the constitutionality of certain provisions of the Federal Election Campaign Act presented no case or controversy sufficiently ripe to invoke the declaratory powers of federal courts where petitioners made no showing that they would engage in conduct restricted by those provisions and where the Commission had taken no steps to enforce those provisions against petitioners.

(2) Whether the courts below properly concluded that petitioners may not invoke the special jurisdictional provisions of the Federal Election Campaign Act where petitioners presented no case or controversy sufficiently ripe to invoke the declaratory powers of federal courts.

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OCTOBER TERM, 1980

No. 80-349.

NATIONAL CHAMBER ALLIANCE FOR POLITICS, ET AL., PETITIONERS,

v.

FEDERAL ELECTION COMMISSION, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Federal Election Commission ("Commission" or "FEC") requests that the petition for writ of certiorari filed by petitioners to review the judgment of the United States Court of Appeals for the District of Columbia Circuit be denied.

OPINIONS BELOW

The opinion of the court of appeals, which is not yet reported, appears in the appendix to petitioners' brief

("Pet. App.") at la. The orders of the court of appeals denying a petition for rehearing and rehearing *en banc* are set forth at Pet. App. at 38a–39a. The memorandum opinion and order of the district court are unpublished and appear at Pet. App. at 40a–42a. The opinion of the district court in *Martin Tractor Co.* v. *Federal Election Commission*, reported at 460 F. Supp. 1017 (D.D.C. 1978), ("*Martin Tractor*") is reprinted in the Commission's Appendix ("App."), *infra*.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1980. On June 10, 1980, the court denied petitioners' petition for rehearing and rehearing *en banc*. The jurisdiction of the Court is invoked under 28 U.S.C. §§ 1254 and 2101(c).

COUNTERSTATEMENT OF THE CASE

On July 20, 1978, petitioners brought suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief from certain provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*, ("FECA" or "the Act"), and requested expedited review pursuant to 2 U.S.C. § 437h(a). Their complaint alleged that 2 U.S.C. § 441b unconstitutionally infringes upon rights guaranteed them by the first and fifth amendments of the Constitution of the United States, insofar as these provisions restrict "solicitation" of contributions to, and by, certain "separate segregated funds" (or political action committees)

maintained by trade associations.[1] Specifically, the Chamber, the Alliance and their officers Lesher, Kochevar and Radewagen, alleged that they "desire to communicate with political action committees" or, in the case of petitioner Roland that he "would . . . undertake communications to political action committees."[2] Petitioners did not define with any precision the form, content, method, place or frequency of those communications.[3]

It is undisputed that none of the petitioners herein has ever requested or received an advisory opinion from the Commission as to the application of 2 U.S.C. § 441b to specific activities petitioners may wish to undertake. Nor is it disputed that the Commission has taken no steps to enforce § 441b against any of the petitioners.

On November 22, 1978, the district court dismissed the complaint because petitioners presented no case or controversy sufficiently ripe for adjudication in that they failed to show any threat of interference beyond that implied by the existence of the law and the regulations. Pet. App. at 41a. The court referred to its opinion concerning nearly identical issues in *Martin Tractor* issued approximately two weeks earlier for a fuller explanation of its decision.[4] Applying the tests

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[1] The provisions of 2 U.S.C. § 441b are set forth at Pet. App. at 70a–74a.

[2] *See* First Amended Complaint, paragraphs 29–30, Pet. App. at 52a.

[3] *See* First Amended Complaint, paragraphs 14 and 15, Pet. App. at 47a–48a.

articulated by this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) and *Gardner* v. *Toilet Goods Association*, 387 U.S. 167 (1967), the district court concluded in *Martin Tractor:*

> . . . first, that the issue framed by plaintiffs, is not readily amenable to judicial review, being uncertain as to both conduct and legal consequences and, secondly, that the harm in delaying review is minimal since plaintiffs have yet to take the relatively costless steps which would permit an initial determination of the legality of their intended conduct.

App. at 9a. The district court also concluded that petitioners herein, like the plaintiffs in *Martin Tractor*, were not among the entities or individuals entitled to invoke the court's jurisdiction under 2 U.S.C. § 437h(a). Pet. App. at 41a; App. at 3a–5a. Accordingly, the district court declined to reach the merits of petitioners' constitutional claims.

On November 29, 1978, petitioners noticed their appeal to the United States Court of Appeals for the District of Columbia Circuit. The court of appeals consolidated petitioners' case with *Martin Tractor*.

In an opinion dated May 8, 1980, the court of appeals affirmed the district court's conclusion that petitioners had failed to present a ripe case or controversy. The court rested its decision on numerous considerations. First, petitioners had made no showing

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[4]Only the granting of an extension of time in the briefing schedule at the request of one of the parties prevented decision of the two cases in tandem. *See* Pet. App. at 40a.

that the challenged provisions would proscribe the conduct in which they desire to engage. They did not specify the precise activities which they wish to undertake. Nor had they sought an advisory opinion from the Commission on the application, if any, of the challenged provisions to such conduct. Pet. App. at 33a–35a. Second, the Commission had taken no action to enforce these provisions against petitioners. Pet. App. at 34a–35a. Third, by reference to its discussion in the *Martin Tractor* case, the court deemed petitioners' case inappropriate for adjudication as a prudential matter, noting the importance of a complete and precise factual record where a federal court has been asked to review the constitutionality of an Act of Congress. Pet. App. at 9a. Finding no case or controversy present, the court declined to reach either the issue of the applicability of 2 U.S.C. § 437h(a) or the merits of petitioners' constitutional arguments. Pet. App. at 36a–37a.

On June 10, 1980, the court of appeals denied petitioners' motion for rehearing. Pet. App. at 38a. Also on June 10, 1980, the *en banc* court of appeals denied petitioners' suggestion for rehearing *en banc*. Pet. App. at 39a.

REASONS WHY THE WRIT SHOULD BE DENIED

The courts below correctly concluded that petitioners had failed to present a case or controversy sufficiently ripe for adjudication as required by Article III of the Constitution of the United States. These decisions are consistent with well-established principles of

justiciability as articulated by this Court and lower federal courts. Further review is not warranted.

(1) Both the district court and the court of appeals fully considered the jurisdictional issues in this case. Applying well-established precedent of this Court, including those cases involving facial first amendment attacks on the constitutionality of statutes or regulations,[5] both courts concluded that this case presented none of the critical indicia of a justiciable controversy.[6]

As this Court has repeatedly held, to establish a justiciable claim under Article III, a plaintiff must allege "such a personal stake in the outcome as to assure . . . concrete adverseness . . . ." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Further, the plaintiff must allege that he has sustained or is immediately in danger of sustaining a direct injury as the result of the challenged executive or legislative action. *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972). "A hypothetical threat is not enough." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947). As the court of appeals stated:

> If the injury be a future one, the injury must be reasonably certain and clearly describable for the

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[5] *See* Pet. App. at 10a–12a for the court of appeals' discussion of principles of facial adjudication. Contrary to petitioners' assertions, Pet. at 10, the court of appeals specifically analyzed the most recent decisions of the Court applicable to this case and, correctly applying the precedents therein, found that even "the special status of facial first amendment attacks on the constitutionality of statutes or regulations" could not render "the case in its present posture . . . ripe for decision." Pet. App. at 10a, 16a.

[6] After a complete analysis of the factual posture of the *Martin Tractor* case, the court of appeals found that "the *National Chamber* case presents an even more elusive factual context than that presented in *Martin Tractor*." Pet. App. at 33a.

> action to be deemed "ripe" for adjudication. The mere possibility of prosecution or the possibility that sanctions authorized under a general regulatory regime may be imposed when the regulatory agency is confronted with specific facts developed in some future agency proceeding is insufficient. [footnote omitted].

Pet. App. at 8a. The court of appeals correctly concluded, applying precedents established by the Court,[7] that petitioners' failure to define the form, content, method, place or frequency of their desired solicitation activities, except in broad terms that merely paraphrased the general language of FECA and the Commission's regulations, necessitated dismissal of the complaint as non-justiciable. *See* First Amended Complaint, paragraphs 14–15, Pet. App. at 47a–48a.[8]

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[7] Petitioners' argument that a proper application of the Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), requires a finding that their complaint should not have been dismissed as non-justiciable is without merit. The court of appeals recognized what the Court observed in *Buckley*—"that '[p]roblems of prematurity and abstraction' . . . may prevent adjudication in all but the exceptional case"—and found no "urgency of decision in this case that outweighs the inadvisability of premature constitutional adjudication . . . ." Pet. App. at 26a, 27a, *quoting Buckley* v. *Valeo*, 424 U.S. at 114.

[8] Petitioners intimate that they have presented a ripe case or controversy by "[making] part of the record below" a "sample solicitation letter" whose contents "typifies the communication through which Petitioners would communicate . . . ." Petition at 3, 8; Pet. App. at 56a–59a. Such facts were not, however, alleged. Rather, the "sample" letter was merely appended to their response to the Commission's motion to dismiss their complaint and was properly disregarded by the district court pursuant to Federal Rule of Civil Procedure 12(b). Even if such facts had been alleged in petitioners' complaint, the tenuous posture in which petitioners even now present them sheds little light on the actual conduct they seek to undertake.

As the court of appeals observed, a determination as to whether specific activity or conduct is a "solicitation" pursuant to these provisions is an intensely factual one. Pet. App. at 16a–22a.[9] Should petitioners in fact decide to engage in particular solicitation activity, the court advised that "[w]hen a means like the [Commission's advisory opinion procedure] is available to reduce uncertainty or narrow the statute's reach and that means can be pursued at little risk to the rights asserted," any First Amendment chill is reduced. Pet. App. at 22a. 2 U.S.C. § 437f. The Court noted that FECA provides that any person may request an advisory opinion from the Commission, that the Commission must render such an opinion within 60 days of the request, and that a person receiving an opinion from the Commission may rely on it as "a defense to criminal prosecution or civil suit." Pet. App. at 21a. The Court should recognize, as did the courts below, that other organizations similar to appellants have successfully used the Act's advisory opinion procedure to determine whether the § 441b solicitation restrictions would apply to their specific intended conduct. *See* Pet. App. at 29a–30a. Petitioners, however, instead of utilizing the Commission's advisory opinion procedure, asked the district court to render an advisory opinion on the facial constitutionality of the Act's limitations on trade association solicitations of political contribu-

[9] *See, e.g.*, *Sargent* v. *Genesco*, 492 F.2d 750, 767 (5th Cir. 1974) (meaning of "solicitation" under the Securities Exchange Act). *See also NLRB* v. *Baptist Hospital*, 442 U.S. 773 (1979); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945), (lawfulness of employer-imposed bans on membership "solicitation" by unions).

tions. Federal courts have consistently refused to render such advisory opinions since President Washington requested that Chief Justice Jay construe certain federal laws and treaties in 1793. 3 *Correspondence and Public Papers of John Jay* 486 (H. Johnston ed. 1893). Similarly, the courts below correctly refused to do so.[10]

To the extent that petitioners challenge § 441b "as applied" to them, the Commission can only reiterate that it has neither attempted to nor even threatened to apply that provision against them. Petitioners themselves do not so much as threaten to violate the Act. They have never presented an advisory opinion request to the Commission regarding the application of § 441b to specific proposed conduct. The Commission has never informed them that § 441b would prohibit such conduct. Accordingly, petitioners face no "Hobson's Choice of either knowingly violating a statute with civil and criminal penalties or undertaking a useless administrative act." Petition at 17. By refusing to engage in the "useless" act of invoking the Commission's advisory opinion mechanism, Petition at 14, petitioners have opted to forego the opportunity of applying for a ruling which might permit them to accom-

[10] Requiring that petitioners define their intended activity within the Act's administrative structure may well obviate the necessity of seeking a judicial ruling on the constitutionality of the manner in which the Act may or may not affect those activities. *See, e.g., John B. Anderson* v. *Federal Election Commission*, Civ. Action No. 80–1911 (D.D.C. Sept. 9, 1980) (three-judge court), in which the Commission's favorable response to an advisory opinion request, submitted by plaintiffs after initiating litigation, resulted in the court's dismissal on the grounds of mootness.

plish their objectives in a manner consistent with FECA without risking a violation thereof. Thus, any "Hobson's Choice" is a self-imposed one. Indeed, the district court in *Martin Tractor*, applying the tests of justiciability articulated by this Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), concluded that any harm in delaying review was minimal since petitioners have yet to request an advisory opinion from the Commission, "a relatively costless [step] which would permit an initial determination of the legality of their intended conduct." App. at 9a. Similarly, the court of appeals noted that petitioners "have not communicated with the FEC concerning the activity they would like to undertake" or requested an advisory opinion, a procedure which "can be pursued at little risk to the rights asserted." Pet. App. at 22a, 34a.

Insofar as petitioners challenge § 441b facially, they essentially argue that a justiciable controversy is present because the first amendment prohibits any constraint whatsoever upon the solicitation of contributions, relying on this Court's ruling in *Village of Schaumberg* v. *Citizens for a Better Government*, 444 U.S. 620 (1980).[11] The court of appeals, however, dis-

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[11] To the contrary, *Schaumberg* defined the issue therein as "whether the Village [had] exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech." 444 U.S. at 633. *Accord*, *Central Hudson Gas and Electrical Corporation* v. *Public Service Commission*, ___ U.S. ___, 100 S.Ct. 2343 (1980) ("The First Amendment . . . protects commercial speech from unwarranted governmental regulation."); *Consolidated Edison Co.* v. *Public Service Commission*, ___ U.S. ___, 100 S.Ct. 2326 (1980) ("We must consider whether the State can demonstrate that its regulation is constitutionally permissible."). In any event, the fail-

tinguished *Schaumberg* from petitioners' case noting that in *Schaumberg* "[t]he types of activity in which the organization had engaged and planned to engage were alleged with some particularity . . . and the Village's intention to enforce the ordinance against the complaining organization was clear." Pet. App. at 24a (citations omitted). Indeed, *Schaumberg* itself reinforces the requirement of a ripe case or controversy even in the context of a facial first amendment challenge:

> *Given a case or controversy*, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.

444 U.S. at 634 (emphasis added).[12]

(2) Despite their failure to present a justiciable case or controversy, petitioners argue that the courts below, for prudential reasons, should have permitted petitioners to invoke the courts' jurisdiction pursuant to 2 U.S.C. § 437h(a). This Court, however, affirmed

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ure of petitioners to present the courts below with a ripe case or controversy precluded either court reaching the underlying merits of the complaint. Thus, the substance of petitioners' complaint as it may at some point be presented in the context of a case or controversy is not presently before the Court.

[12]The court also noted the factual posture of *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978)—one "submitted upon '66 paragraphs of stipulated facts and 70 pages of supporting documents relevant to those stipulations.' " Pet. App. at 24a. Petitioners herein failed even to provide the courts below with an advisory opinion rendered by the Commission which would have at the very least more precisely defined petitioners' intended conduct and FECA's application thereto.

Clark v. *Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (*en banc*), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977), in which the court of appeals indicated that even when a complaint is governed by the Act's special review provisions, a live case or controversy might be dismissed for prudential reasons. Judge Leventhal, concurring in *Clark*, would have rested his dismissal of that case entirely on prudential grounds.[13] *Id.* at 657. Judge Robinson, dissenting, disagreed, arguing that Congress, in enacting 2 U.S.C. § 437h(a), and the Supreme Court, in its decision in *Buckley* v. *Valeo*, *supra*, had eliminated from adjudication under § 437h(a) the extraconstitutional aspects of "justicability." 431 U.S. at 669. The majority took issue with Judge Robinson's dissent:

> To the extent [Judge Robinson's] language may be read as suggesting a view that Congress may "command" the judiciary to act contrary to the rules relative to ripeness the Supreme Court has developed "for its own governance in the cases confessedly within its jurisdiction," Ashwander v. Tennessee Valley Authority, 297 U.S. 288 . . . (Brandeis, J., concurring), we respectfully disagree.

Id. at 650 n. 11.[14]

To the extent that the court of appeals below may have rested its conclusion on prudential aspects of the

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[13] Judge Leventhal was a member of the court of appeals panel and heard these cases through oral argument. *See* Pet. App. at 2a.

[14] The district court below held that, in any event, none of the petitioners herein were entitled to invoke the review provision of 2 U.S.C. § 437h(a) as they are not among the entities enumerated in that provision. Pet. App. at 41a, App. at 3a–5a.

ripeness doctrine, such considerations were well-founded. As the court observed:

> Because of the " 'great gravity and delicacy' of [the courts'] function in passing upon the validity of an act of Congress," the need is manifest for a "full-bodied record" in such adjudication.

Pet. App. at 9a (citations omitted). In *United States* v. *UAW*, 352 U.S. 567 (1957), a case which involved an alleged violation of the statutory predecessor of the provisions at issue here, the Court emphasized the importance of a detailed factual record upon which a court might frame, limit or avoid a constitutional decision, noting that the constitutionality of the statute should not be considered "unless absolutely necessary to a decision of the case." *Id.* at 590, quoting *Burton* v. *United States*, 196 U.S. 283, 295 (1905).[15] Similarly, the court of appeals concluded that other cases in which this Court has reached the merits of facial first amendment challenges have presented factual situations sufficiently developed to reveal the contours of the parties' dispute. Pet. App. at 23a-26a. Here, however, petitioners request such an adjudication upon a barren record.

Finally, petitioners' reliance upon *Buckley* v. *Valeo*, *supra*, is misplaced. In *Buckley*, this Court acknowledged that, "ripeness is peculiarly a matter of timing."

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[15] *See also Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972); *United States* v. *CIO*, 335 U.S. 106 (1948). Indeed, as the court of appeals pointed out, petitioners conceded in their brief to the court that "[c]entral to the Supreme Court's exegesis of the ripeness doctrine is the insistance [sic] on a sufficiently defined record to insure informed and appropriately narrow adjudication." Pet. App. at 10a.

Id. at 114. Noting that the Court in *Buckley* was confronted with fundamental challenges to the election laws just as they were being put into operation for the 1976 elections, the court of appeals correctly concluded that, "the 'question of timing' before the Supreme Court in the *Buckley* case can hardly be likened to the one before us now." Pet. App. at 27a.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

CHARLES N. STEELE
General Counsel

KATHLEEN IMIG PERKINS
Assistant General Counsel

SONDRA L. MILLS
Attorney

Attorneys for

FEDERAL ELECTION COMMISSION,
MAX L. FRIEDERSDORF,
JOHN W. MCGARRY,
JOAN D. AIKENS,
THOMAS E. HARRIS,
FRANK P. REICHE,
ROBERT O. TIERNAN,
EDMUND L. HENSHAW, JR.
J. STANLEY KIMMITT

1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

OCTOBER 6, 1980

APPENDIX

United States District Court,
District of Columbia,
Civil Division.

Nov. 8, 1978.

Civ. A. No. 78-1259.

MARTIN TRACTOR COMPANY ET AL., PLAINTIFFS,

v.

FEDERAL ELECTION COMMISSION ET AL.,
DEFENDANTS.

Edward A. McCabe, John G. DeGooyer, Mark Sullivan, III, Anthony J. Thompson, Hamel, Park, McCabe & Saunders, Washington, D.C., for plaintiffs.

William C. Oldaker, Charles N. Steele, Kathleen Imig Perkins, Federal Election Commission, Washington, D.C., for defendants.

MEMORANDUM

OBERDORFER, *District Judge.*

I.

Three corporations, their political action committees, executives of two of them and a non-salaried employee of one of them here sue the Federal Election

Commission and its members for a declaratory judgment that one section of the Federal Election Campaign Act of 1971, as amended in 1976, 2 U.S.C. § 431 *et seq.*, (the Act) violates rights guaranteed to them by the First and Fifth Amendments of the Constitution. The alleged violations result from a threat, apparent on the face of § 441b of the Act, that if corporate and executive plaintiffs sought voluntary contributions to a political fund from hourly employees orally and in writing, on or off the corporation's premises, more than twice a year, they could be punished by fine and imprisonment. This threat has allegedly caused these plaintiffs to limit their exercise of their constitutional right to seek such voluntary contributions by communicating with hourly employees and concurrently impinged upon the right of the hourly employee plaintiff to receive such communication. Plaintiffs also seek injunctive relief to prevent enforcement of § 441b and the regulations pursuant thereto.

Defendants have moved to dismiss this complaint for lack of jurisdiction over the subject matter or for failure to state a claim upon which relief can be granted. Recognizing that the spirit of the Act requires prompt Court attention to constitutional questions raised about it,[1] and also recognizing the possible need of the parties for prompt action by this Court in order to expedite appeal from whatever decision it might make, the defendants' motion to dismiss was granted on October 18, 1978, with an indication that an explanatory memorandum would be forthcoming promptly.

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[1] *See* 2 U.S.C. § 437h(a), discussed further below.

The decision to dismiss the complaint was based upon the Court's conclusion, first, that plaintiffs may not invoke the statutory provision for judicial review provided in 2 U.S.C. § 437h and, secondly, that even if they qualified under that section, they presented as yet no case or controversy sufficiently ripe to invoke the declaratory powers of a federal court. A brief outline of the statutory scheme for enforcement written into the Act by Congress is necessary background to those conclusions.

In general the statute contemplates that defendants should investigate any complaint about violation of the Act in confidence and allow any person there charged a reasonable opportunity to respond; 2 U.S.C. § 437g. The Court accepts as binding upon the FEC its statement that a party may raise any defenses or arguments during such proceedings, including constitutional ones; Brief at 8. If the defendants later determine that there is reasonable cause to believe that a violation either has occurred or is threatened, they must attempt informal resolution of that alleged or threatened violation for at least thirty days. If the informal resolution fails, defendants may file a civil enforcement action in a federal district court; if they find that a knowing and willful violation has occurred, the defendants may refer the matter to the Attorney General who may or may not initiate criminal prosecution.

II.

[1] Plaintiffs claim that they are entitled to invoke the Court's jurisdiction under a unique provision of the Act which authorizes particular persons to sue "for de-

claratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act." 2 U.S.C. § 437h(a). Section 437h(a) had the purpose and effect of expediting judicial review of questions raised in Congress about the constitutionality of particular provisions of the Act so that these questions could be authoritatively resolved before the Presidential Election of 1976. *See* Remarks of Senator James Buckley, 119 Cong.Rec. S5707 (daily ed. April 10, 1974); *Buckley* v. *Valeo*, 424 U.S. 1, 11-12, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Plaintiffs do not suggest that § 441b here at issue was among the provisions whose constitutionality was questioned in Congress. In any event, and crucial here, access to court pursuant to § 437h(a) was by its terms limited to "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States."

Neither the corporate plaintiffs nor the political action committees are in the category of entities or individuals entitled to invoke the Court's jurisdiction under § 437h(a). The decision to dismiss their complaint seems therefore to be *a fortiori*.

A closer question is raised with respect to the executive plaintiffs and the hourly employee plaintiff. The complaint alleges that they are eligible voters; the complaint puts at issue, however, not their rights as voters, but rather the constitutionality of the Act's provisions relating to communications between a corporation and its employees about voluntary contributions. Thus, as defendants persuasively contend, the individual plaintiffs do not sue in their individual

capacities to protect their individual rights to vote or even to make contributions. They sue to vindicate a claimed right of their corporate employer to influence its employees (including one of the plaintiffs) to make voluntary political contributions. While the question is not free from doubt, the Court has concluded that this kind of derivative right was not the constitutional right of "an individual eligible to vote" which Congress considered "appropriate" for vindication in a special declaratory judgment action under § 437h, particularly where, under the statutory scheme there is an alternative process for resolution of the substantive issue in the context of a particular transaction, *infra*.

III.

[2] The result would be no different if the Court assumed, contrary to the foregoing conclusion, that plaintiffs could qualify under § 437h. That section, while it may confer standing on certain classes, cannot by itself create a justiciable controversy. All actions brought under the statutory provisions for judicial review are subject to the requirements of "case and controversy" and "ripeness." *See United Public Workers* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *Muskrat* v. *United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911). Whether required by Article III of the Constitution or in part an expression of the discretion inherent in equity and declaratory judgment jurisdiction, these restrictions upon the jurisdiction of the federal courts are well established. Under the facts of this case, the Court concludes that there is at present no case or controversy sufficiently

ripe for declaratory action. Plaintiffs merely allege that they communicated more freely with employees about contributions before the Act became law and desire to resume the practice and would do so but for the Act. They have not, however, advised defendants of their desire to communicate with their employees differently from the times and manner prescribed by law, nor sought any ruling by defendants to accommodate that desire. Neither have defendants taken any steps to invoke the statutory enforcement procedures. Where then is the case or controversy?

Abbott Laboratories v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) establishes a test for determining whether action taken by an agency has created a sufficiently "ripe" controversy to permit granting of declaratory or injunctive relief. The challenge there was to a final action of the Federal Trade Commission in approving regulations which required drug manufacturers to print the "established name" of a drug in a specified typeface on any label or printed material, whenever it printed the "proprietary name" of that drug.

Noting that the rationale of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," the Court set forth a twofold test involving the balancing of "the fitness of the issues for judicial decision" and the "hardship to the parties of

withholding court consideration." *Id.* at 149, 87 S.Ct. at 1515.

As to the first factor, the Court noted that the issue for review was a "purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed." *Id.* In contrast in this case factual issues which have not yet been developed are central to evaluating the constitutionality of the challenged provisions. For example, whatever the First Amendment rights of corporations, *see First National Bank* v. *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), they are not without limits and have been long subject to regulation in the context of protecting employees from pressure from employers. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). The balancing of the interests of a corporation and its employees (as well as the rights of others in society which are sought to be protected by the provisions of the Act challenged here) requires a factual record. Such a record may be based upon actual conduct of the corporation since the provision was enacted, which conduct the Commission challenges, or upon a threat of such conduct sufficiently definite so that the Commission can determine whether it would violate the Act. Only such a record would permit a court confidently to evaluate, among other relevant factors, the extent to which the conduct resembles speech activity or nonspeech activity, the extent of the pressures the conduct exerts upon employees or others, and whether the corporation could accomplish its legitimate objec-

tives by alternative means consistent with the statute.[2]

In considering the fitness for judicial review, the *Abbott* Court also noted that there was no claim that further agency action would be contemplated. The Court found the regulations at issue to be "final agency action" within the meaning of 5 U.S.C. § 704. The ruling was "quite clearly definitive" with "no hint that this regulation is informal . . . or only the ruling of a subordinate official . . . ." *Id.*, 387 U.S. at 151, 87 S.Ct. at 1517. Here by contrast plaintiffs as of yet challenge no agency determination that their conduct violates or would violate the Act. The Court is required not only to speculate about the exact nature of plaintiffs' conduct, but also about whether in fact the FEC would find that conduct to violate the Act.

Turning to the second factor, the hardship of withholding court consideration until a later time, the *Abbott* Court noted that compliance would require petitioners to "change all their labels, advertisements, and promotional materials . . . and . . . invest heavily in new printing type and new supplies. The alternative to compliance . . . may be even more costly. That course would risk serious criminal and civil penalties . . . To require [plaintiffs] to challenge these regula-

[2] *See* Scarpf, "Judicial Review and the Political Question: A Functional Analysis," 75 *Yale L.J.* 517, 531 (1966): "[T]he Court [in *United Public Workers* v. *Mitchell, supra*] may well have regarded the constitutional balance between the political rights of civil servants and the legitimate public interest in a neutral civil service as an extremely close one, depending very much upon the actual scope of enforcement and upon the concrete nature of the activities against which sanctions were to be applied."

tions only as a defense to an action brought by the Government might harm them severely and unnecessarily." *Id.* at 152, 153, 87 S.Ct. at 1517.

By contrast, plaintiffs here face no Hobson's choice between costly compliance or the risk of serious criminal or civil penalties. Plaintiffs need not even engage in the conduct whose legality concerns them. There is no showing that they could not apply for and attempt to negotiate a ruling which would permit them safely to accomplish their objectives consistently with the Act. Moreover, the enforcement procedures of the Act may be triggered either by actual conduct or a genuine threat thereof. Even if they engage in such conduct, however, the enforcement procedure which is yet to be invoked contemplates mandatory conciliation before legal action may be taken. After conciliation has failed, both the conduct to be reviewed and the FEC's position with respect to that conduct would be far more concrete and susceptible to judicial scrutiny through a declaratory action.

To summarize the application of the *Abbott* test, then, the Court concludes, first, that the issue framed by plaintiffs is not readily amenable to judicial review, being uncertain as to both conduct and legal consequences and, secondly, that the harm in delaying review is minimal since plaintiffs have yet to take the relatively costless steps which would permit an initial determination of the legality of their intended conduct.

In the course of reaching these conclusions, the Court has also considered whether, in a case involving First Amendment rights which requires a sensitivity to "chilling effects," such effects may create a ripe con-

troversy at an earlier stage than in a case not involving First Amendment rights; *cf. Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 187, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967) ("Where personal status or liberties are involved, the courts may well insist upon a considerable ease of challenging administrative order or regulations"). Although plaintiffs allege they did engage in solicitation which they have ceased since enactment of the Act, in light of the enforcement-cum-conciliation provisions of the statute and the minimal cost of triggering those provisions, any chilling effect is at present highly subjective and, as the Court concluded in *Laird* v. *Tatum*, 408 U.S. 1, 13–15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972), "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[3]

The conclusion that there is no controversy sufficiently ripe to invoke declaratory relief is further supported by *United Public Workers* v. *Mitchell*, *supra*, which itself involved First Amendment rights. There plaintiffs challenged provisions of the Hatch Act which forbade their participating in political campaign activities. The Court found it inadequate merely to "declare a desire to act contrary to the rule against political activity but not that the rule has been violated." *Id.*, 330 U.S. at 88, 67 S.Ct. at 563. "No threat of interference by the [Civil Service] Commission with

[3]There is no allegation here that plaintiff has sought through the enforcement procedures or otherwise to clear its intended conduct with the Commission and that the Commission has refused either to invoke those procedures or give informal approval. Use of the potential threat of those procedures as a "Sword of Damocles" might present a different case.

rights of these appellants appears beyond that implied by the existence of the law and the regulations." *Id.* at 91, 67 S.Ct. at 565. Justice Douglas' dissent in that case noted that the appellants' alternative of violating the rule would result in the loss of jobs, seniority and benefits; as noted above, by contrast, plaintiffs will suffer little harm, if any, should they be required to "ripen" their claims before seeking judicial review.

It is for these reasons that the Court granted defendants' motion to dismiss.

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